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U.S. Department of Justice

Immigration and Naturalization Service

PUBLIC COPY

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

FILE [redacted] Office: San Antonio Date: JAN 08 2003

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

IN BEHALF OF APPLICANT: [redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, San Antonio, Texas, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure admission into the United States by fraud or willful misrepresentation in 1977. The applicant is the beneficiary of an approved Petition for Alien Relative filed by his U.S. citizen daughter. The applicant seeks the above waiver in order to remain in the United States and reside near his family.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the application accordingly.

On appeal, counsel states that the decision was not supported by controlling case law, e.g., Matter of Alonso, 17 I&N Dec. 292 (Comm. 1979); and Matter of Da Silva, 17 I&N Dec. 288 (Comm. 1979). Counsel asserts that the applicant is 70 years old, has exhibited remorse and rehabilitation, has continuous residence in the United States since 1985, has a lawful permanent resident spouse, has 13 children who are either U.S. citizens or lawful permanent residents, has maintained two jobs for many years, has paid taxes, and has a 1990 Judicial Recommendation Against Deportation.

In Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999), the Board held that the underlying fraud or misrepresentation may be considered as an adverse factor in adjudicating a section 212(i) waiver application in the exercise of discretion. Matter of Tijam, 22 I&N 408 (BIA 1998), followed. The Board declined to follow the policy set forth by the Commissioner in Matter of Alonso, and Matter of Da Silva, and noted that the United States Supreme Court ruled in INS v. Yueh-Shaio Yang, 519 U.S. 26 (1996), that the Attorney General has the authority to consider any and all negative factors, including the respondent's initial fraud.

The record reflects the following:

> On February 16, 1977, the applicant attempted to procure admission into the United States by falsely claiming to be a United States citizen by presenting a fraudulent Texas birth certificate which he purchased in 1976. On February 17, 1977, he was convicted of violations of 8 U.S.C. § 1325 and § 371, sentenced to 90 days in jail, with sentence suspended for 5 years, and was returned to Mexico.
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> On September 9, 1984, the applicant attempted to procure admission into the United States by presenting a fraudulent delayed birth certificate.

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On October 5, 1989, the applicant became the beneficiary of a Petition for Alien Relative filed by his daughter, a naturalized U.S. citizen. On the petition he claimed to be a citizen of Mexico. This was supported by a Mexican birth certificate. That visa petition remains unadjudicated in the record. A second Petition for Alien Relative was filed on September 2, 1997, and was approved on March 25, 1998.

On January 3, 1991, the applicant pleaded guilty to a violation of 18 U.S.C. 911, for having willfully and knowingly represented himself to be a United States citizen, when in truth and in fact, he knew that the statement was false. This was in connection with his August 6, 1985 application for a U.S. passport. The passport was issued at Houston, Texas, on August 8, 1985. He was sentenced to two years in prison, with imposition of sentence suspended, and wasa placed on probation for two years. The applicant had entered into a plea agreement on September 14, 1990, and on November 20, 1990, the applicant's Motion for a Judicial Recommendation Against Deportation was granted.

An Order to Show Cause was served on the applicant on September 27, 1990. A Notice to Appear was served on August 19, 1997. The Notice to Appear was cancelled pursuant to 8 C.F.R. § 239.2.

The record also reflects that the applicant obtained legal immigrant status for four of his children using the fraudulently obtained U.S. passport.

In Matter of Balderas, 20 I&N Dec. 389 (BIA 1991), the Board noted that, in the past Congress provided a perpetual bar against the use of a conviction as a basis for deportation by giving effect in immigration proceedings to a pardon or a judicial recommendation against deportation. The Board noted also that the use of the phrases such as, "the conviction was waived under section 212(c) of the Act," is misleading. Instead, the appropriate reference should be to a waiver of excludability or deportability, or more precisely, to a grant of relief under section 212(c) of the Act. Thus, when section 212(c) relief is granted, the Attorney General does not issue a pardon or expungement (expunction) of the conviction itself. Instead, the Attorney General grants the alien relief upon a determination that a favorable exercise of discretion is warranted on the particular facts presented, notwithstanding the alien's excludability or deportability. Therefore, since a grant of section 212(c) relief "waives" the finding of excludability itself, the crimes alleged to be grounds for excludability or deportability do not disappear from the alien's record for immigration purposes and may be considered in a new hearing with respect to issues of rehabilitation and discretion.

Section 212(a)(6)(C) of the Act provides, in part, that:

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> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act provides that:

> (1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.
>
> (2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

Sections 212(a)(6)(C) and 212(i) of the Act were amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub L. 104-208, 110 Stat. 3009. There is no longer any alternative provision for waiver of a section 212(a)(6)(C)(i) violation due to passage of time. Nothing could be clearer than Congress' desire in recent years to limit, rather than extend, the relief available to aliens who have committed fraud or misrepresentation. Congress has almost unfettered power to decide which aliens may come to and remain in this country. This power has been recognized repeatedly by the Supreme Court. See Fiallo v. Bell, 430 U.S. 787 (1977); Reno v. Flores, 507 U.S. 292 (1993); Kleindienst v. Mandel, 408 U.S. 753, 766 (1972). See also Matter of Yeung, 21 I&N Dec. 610, 612 (BIA 1997).

Congress has increased the penalties on fraud and willful misrepresentation, including the narrowing of the parameters for eligibility, the re-inclusion of the perpetual bar and eliminating children as a consideration in determining the presence of extreme hardship. Congress has placed a high priority on reducing and/or stopping fraud and misrepresentation related to immigration and other matters.

Section 212(i) of the Act provides that a waiver of the bar to admission resulting from section 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Although extreme hardship is a requirement for section 212(i) relief, once established, it is but one favorable discretionary factor to be considered. See Matter of Mendez, 21 I&N Dec. 296 (BIA 1996).

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In Matter of Cervantes-Gonzalez, supra, the Board of Immigration Appeals (BIA) stipulated that the factors deemed relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act include, but are not limited to, the following: the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and finally, significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

The BIA noted in Cervantes-Gonzalez that the alien's wife knew that he was in deportation proceedings at the time they were married. The BIA stated that this factor goes to the wife's expectations at the time they were wed. The alien's wife was aware that she may have to face the decision of parting from her husband or following him to Mexico in the event he was ordered deported. The alien's wife was also aware that a move to Mexico would separate her from her family in the United States. The BIA found this to undermine the alien's argument that his wife will suffer extreme hardship if he is deported. The BIA then refers to Perez v. INS, 96 F.3d 390 (9th Cir. 1996), where the court stated that "extreme hardship" is hardship that is unusual or beyond that which would normally be expected upon deportation. The common results of deportation are insufficient to prove extreme hardship.

The applicant in the present matter had been unlawfully present in the United States since 1985. It must be presumed that his wife was aware that he was a citizen of Mexico and not the United States as early as his first false claim conviction on February 17, 1977, since he had been married to her since December 16, 1971.

The BIA in Cervantes-Gonzalez also referred to Silverman v. Rogers, 437 F.2d 102 (1st Cir. 1970), cert. denied 402 U.S. 983 (1971), where the court stated that, "even assuming that the Federal Government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States."

The court held in INS v. Jong Ha Wang, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

There are no laws that require a United States citizen or lawful permanent resident who has not been ordered removed to leave the United States and live abroad. Further, the common results of deportation are insufficient to prove extreme hardship. See Hassan v. INS, 927 F.2d 465 (9th Cir. 1991). The uprooting of family and separation from friends does not necessarily amount to extreme

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hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has failed to show that the qualifying relative (his wife) would suffer extreme hardship over and above the normal economic and social disruptions involved in the removal of a family member. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion.

The grant or denial of the above waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Attorney General and pursuant to such terms, conditions, and procedures as he may by regulations prescribe. Further, following Matter of Balderas, supra, the applicant's violations may be considered with respect to issues of rehabilitation and discretion.

The favorable factors include the applicant's family ties, the alleged hardship to his wife, and the passage of time since his last violation.

The unfavorable factors include the applicant's convictions for offenses relating to procuring admission into the United States by fraud or willful misrepresentation, and other document fraud, the applicant's employment without Service authorization, and his lengthy stay in the United States without Service authorization.

As the Board noted in Matter of Cervantes-Gonzalez, the United States Supreme Court ruled in INS v. Yueh-Shaio Yang that the Attorney General has the authority to consider any and all negative factors in deciding whether or not to grant a favorable exercise of discretion. See Matter of Cervantes-Gonzalez, at p. 12.

The applicant's actions in this matter cannot be condoned. The unfavorable factors in this matter outweigh the favorable ones. In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.